(1)

83 - 1864

Office - Supreme Court, U.S
FILED
MAY 14 1984
ALEXANDER L. STEVAS,
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD THORNBURGH, Governor, HELEN O'BANNON, Secretary of the Department of Public Welfare, and DON JOSE STOVALL, Executive Director, Philadelphia County Board of Assistance

Petitioners

V.

MARTIN NELSON, PAULA BUNTELE, and THOMAS MOBLEY

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LeROY S. ZIMMERMAN
Attorney General

By: ANDREW S. GORDON
Senior Deputy Attorney General
Counsel of Record

MAURA A. JOHNSTON
Deputy Attorney General

ALLEN C. WARSHAW
Senior Deputy Attorney General
Chief, Litigation Section
Attorneys for Petitioners

Office of Attorney General
1545 Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

13 | 84

QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 504 of the Rehabilitation Act of 1973 requires a recipient of federal funds to pay for readers whose assistance is necessary to permit blind employes to perform the essential tasks of their jobs when provision of readers would cost $6,600 per year for each blind worker.

2. Whether the Eleventh Amendment bars prospective injunctive relief requiring substantial expenditures of funds by state officials when the sole basis for the injunctive order is a failure to satisfy the provisions of a federal funding statute passed pursuant to Congress' spending power.

TABLE OF CONTENTS

TABLE OF CITATIONS

Constitution

Statutes

Regulations

PARTIES TO THE PROCEEDING

Petitioners are Pennsylvania Governor Richard Thornburgh, Department of Public Welfare Secretary Helen O'Bannon and Philadelphia County Board of Assistance Executive Director Don Jose Stovall.

Respondents are Martin Nelson, Paula Buntele and Thomas Mobley.

OPINIONS BELOW

The judgment order of the Court of Appeals (Pet. App. 1a-3a) is not yet reported. The opinion of the district court (Pet. App 4a-75a) is reported at 567 F.Supp. 369 (E.D. Pa. 1983).

JURISDICTION

The Court of Appeals entered its judgment order affirming the decision of the district court on March 6, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides, in pertinent part, as follows:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . .

STATEMENT OF THE CASE

Following a bench trial in the United States District Court for the Eastern District of Pennsylvania, defendants Richard Thornburgh, Governor of Pennsylvania; Helen O'Bannon, Secretary of the Pennsylvania Department of Public Welfare ("DPW"); and Don Jose Stovall, Executive Director of the Philadelphia County Board of Assistance, were ordered to provide blind caseworkers employed by DPW[1] with

---

[1]The district court approved class relief for blind DPW employes classified as Income Maintenance Workers, Social Workers, Casework Supervisors, Caseworkers, Public Welfare Administrators, Rehabilitation Specialists, Rehabilitation Counselors, Rehabilitation Supervisors, Rehabilitation Teachers, Clerk Typists I and II, and Clerical Supervisors. Pet. App. 76a-81a. At trial, plaintiffs' counsel estimated that the class consisted of 78 employes. Pet. App. 82a-83a.

readers (or equivalent mechanical devices) which are necessary to permit the blind workers to perform their jobs. Pet. App. 72a-75a. The Court of Appeals affirmed. Pet. App. 1a-3a.

The facts adduced at trial, as found by the district court, showed that the caseworker job entails substantial paperwork and only with the assistance of a reader can blind employes perform their jobs satisfactorily. Pet. App. 5a. The caseworker is required to fill out by hand a basic five-page eligibility form and other forms as necessary based upon information gathered from the client. Pet. App. 10a-13a. This information is provided during the client interview either orally, or in the form of written receipts, notes or other documents. Pet. App. 12a-13a. The caseworker then consults DPW's 1,000-page

eligibility manual, determines the client's eligibility for assistance and fills out a form which is processed by the clerical staff. Pet. App. 13a-15a. Eligibility of each client is redetermined at six-month intervals. Redetermination requires the caseworker to review the client's file and then to perform the complete eligibility determination process outlined above. Pet. App. 14a, n.5. From time to time, caseworkers are required to handle emergency requests for aid and special projects. Pet. App. 16a.

Caseworkers receive yearly salary and benefits of approximately $25,000. Pet. App. 98a. The blind caseworkers also receive non-taxable Supplemental Security Income benefits of about $316 per month to help defray work-related expenses incurred by virtue of their blindness. Pet. App. 19a-20a. In the

past, the caseworkers employed readers on their own. Pet. App. 18a.

Prior to this litigation, DPW provided the blind caseworkers with a number of accommodations. Their readers are permitted to use DPW facilities and supplies. Free braille paper is provided. Supervisors and other employes make a special effort to assist the blind caseworkers and to check their work more closely. They have been provided with additional equipment such as a typewriter. The blind caseworkers have been exempted from the full requirements of conducting field interviews and are permitted to keep their present caseloads when those of other caseworkers have been shifted. Plaintiff Mobley was reassigned to an office closer to his home. Also, Mobley was permitted to require

his clients to return the day after the initial interview to sign the forms. Pet. App. 84a-97a. As the district court found, these accommodations are helpful, but insufficient to permit the caseworkers "to perform the essential functions of their job without readers." Pet. App. 25a.

The district court considered a variety of accommodations which would permit the blind caseworkers to do their jobs. The court found that, with adjustments in work schedules (which already had been permitted for Mobley), the caseworkers could perform their jobs if provided with readers for half a day at a cost of approximately $6,600 per year for each caseworker. Pet. App. 31a-33a. The court also noted that purchase of Versabraille machines and printers at a total cost of $7,700 per machine plus yearly maintenance

costs of $700 per machine and the brailling of the DPW manual at a cost of $34,000 would reduce, but not eliminate, the need for readers. Pet. App. 26a-34a.

In returning a judgment for the plaintiffs, the district court distinguished this case from Southeastern Community College v. Davis, 442 U.S. 397 (1979), on the ground that Ms. Davis had an insurmountable handicap, while plaintiffs' handicaps here were surmountable. Pet. App. 43a-47a. In concluding that the provision of readers would not place an undue burden on DPW, the district court relied upon Department of Health and Human Services regulations, 45 C.F.R. § 84.12(b) (1982), which provide that supplying readers is a reasonable accommodation. Pet. App. 48a-50a. The court also relied upon DPW's

large budget ($300,000,000 for administration of public assistance programs) to buttress its conclusion that provision of readers would not present an undue burden. Pet. App. 52a-53a.

Accordingly, the district court ruled that DPW was required to provide blind workers with readers or their mechanical equivalent. Pet. App. 72a. The Court of Appeals affirmed without opinion.[2] Pet App. 1a-3a.

---

[2]In a footnote, the Court of Appeals disposed of petitioners' Eleventh Amendment argument stating only that Pennhurst State School and Hospital v. Halderman, No. 81-2101 (January 23, 1984) did not compel reversal of the district court's decision. Pet. App. 3a, n.1.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Important, Recurring Questions Concerning the Obligations Placed Upon Recipients of Federal Funds by Section 504 of the Rehabilitation Act of 1973 and Conflicts With This Court's Decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979).

Section 504 of the Rehabilitation Act of 1973 provides, in pertinent part, as follows:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . .

29 U.S.C. § 794. Since the passage of Section 504, this Court has had only one occasion on which to interpret its provisions. In Southeastern Community College v. Davis, 442 U.S. 397 (1979)

(hereinafter "Davis"), the Court decided that Section 504 did not require an educational institution to undertake substantial modifications to its program which were necessary to permit Davis to participate in the program. Although the Davis Court was able to harmonize the applicable Department of Health and Human Services ("HHS") regulations with its holding, the Court was careful to point out that, if the regulations imposed requirements "beyond those necessary to eliminate discrimination . . . they would constitute an unauthorized extension of the obligations imposed by [Section 504]." Id., 442 U.S. at 410. This case squarely raises the question whether HHS's regulations go beyond "the carefully worded non-discrimination provision of § 504." University of Texas v. Camenisch, 451 U.S. 390,

399 (1981) (Burger, C.J., concurring) (emphasis in original).

In reaching its conclusion that DPW was required to provide and pay for readers, the district court found support in the HHS regulations implementing Section 504. Pet. App. 48a-50a. Specifically, the regulations require reasonable accommodations for handicapped persons, 45 C.F.R. §§ 84.3(k) (1), 84.4(a) (1983), and state that "the provision of readers" is a reasonable accommodation. 45 C.F.R. § 84.12(b)(2) (1982). The regulations are not absolute. If accommodation would impose an undue burden it is not mandated. 45 C.F.R. § 84.12(c) (1983). Whether a particular accommodation imposes an undue burden is determined by considering

> (1) The overall size of the recipient's

program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

45 C.F.R. § 84.12(c) (1983).

In applying these regulations, the district court compared the "modest cost of providing half-time readers" ($6,600 per employe each year) with DPW's $300,000,000 administrative budget and arrived at the conclusion that provision of readers would not amount to an undue burden on the agency. Pet. App. 52a-54a. It seems clear that the regulations contemplate this type of comparison, but Davis does not.

In Davis, the Court drew a line between elimination of discrimination and affirmative action--Section 504 requires the former, but not the latter. 442 U.S. at 410-413. To be sure, discrimination and affirmative action do not occupy watertight compartments, and the elimination of discrimination may require some expenditures by recipients of federal funds. Id., 442 U.S. at 412. But no reasonable construction of the term "discrimination," as interpreted in the context of Section 504 by Davis, encompasses DPW's treatment of the caseworkers.

As we detailed earlier (pp. 4-5, supra.), DPW has provided the caseworkers with a variety of accommodations designed to help them in overcoming their handicap. The accommodations ordered by the district court clearly constitute affirmative action; they

involve substantial expenditures on an ongoing basis for a number of employes. It is reasonable to assume that, if this ruling is permitted to stand, DPW and many other agencies throughout the country will be required to hire auxiliary aides and purchase additional equipment for handicapped employes. Presumably, the need to make these additional, and often continuing, expenditures could not be considered in the initial hiring decision -- this despite the fact that it will cost over $6,000 per year more to employ a blind caseworker than one who is not so handicapped. If this is not the type of affirmative action disapproved in Davis, it is difficult to envision what would be improper.

Recipients of federal funds are entitled to know the conditions imposed upon them by Congress when they decide

to accept federal grants. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981). This Court should take this opportunity to clarify for the recipients of federal funds the nature of their obligations under Section 504.

2. The Decision Below Conflicts With Decisions of Other Courts of Appeals.

The court below ordered DPW to provide readers for blind employes within the approved class at a cost of about $6,600 per year for each employe. Plaintiffs' counsel estimated at trial that the class included about 78 employes. Pet. App. 82a-83a. Although it is not clear on the record whether each of those employes would require the level of accommodation ordered for the named plaintiffs, it is clear that DPW will be required to expend each

year much more than the $20,000 necessary to accommodate the three named plaintiffs.

In Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F.2d 490 (1st Cir. 1983), the First Circuit rejected a claim that Section 504 required a local transit to purchase buses fitted with wheelchair bays and elevators. The court found that the one-time cost of $320,000 for the additional equipment amounted to affirmative action which went beyond the requirements of Section 504, as interpreted in Davis. Id., at 495-496.

Similarly, in Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982), and American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981), the Courts of Appeals held that Section 504 did not require transportation authorities to undertake sub-

stantial, expensive affirmative steps to make public transportation facilities available to the handicapped.

The court-ordered relief in this case, at least initially, does not rise to the magnitude of the expenditures considered in the public transportation cases mentioned above. But the open-ended nature of the order here, both in terms of duration and the number of persons affected, makes it virtually certain that DPW will be required to expend sums approaching those considered in the cases discussed above.

This Court should grant certiorari in this case to resolve the conflict among the circuits on the question whether Section 504 requires recipients of federal funds to make substantial expenditures to accommodate handicapped persons.

3. This Court Should Resolve the Question Left Open in Pennhurst State School & Hospital v. Halderman, No. 81-2101 (January 23, 1984) Whether the Eleventh Amendment Bars a Federal Court from Ordering State Officials to Expend State Funds When the Basis for the Order Is a Federal Statute Enacted Pursuant to Congress' Spending Power.

In Pennhurst State School & Hospital v. Halderman, No. 81-2101 (January 23, 1984), the Court thoroughly reviewed its prior decisions regarding the Eleventh Amendment. In the course of this review, the Court specifically declined to decide whether Edelman v. Jordan, 415 U.S. 651 (1974), supported the proposition that a federal court may order prospective injunctive relief against states on the basis of federal statutory law. Slip op. at 13, n. 13. Of course, in Edelman, the propriety of ordering prospective injunctive relief against the state under federal statu-

tory law was conceded by the state. 415 U.S. at 664. This case is the proper vehicle for resolving this important question of constitutional law.

"The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the government from acting, or to compel it to act.' " Dugan v. Rank, 372 U.S. 609, 620 (1963) (citations omitted), quoted in Pennhurst, supra, slip op. at 10-11, n. 11. Here, there can be no dispute that the relief sought by plaintiffs would operate against the state in each of the foregoing respects. Nor can it be seriously contended that Pennsylvania has waived its immunity from suit

either generally[3] or by accepting federal funds."[4] Thus, the only issue is whether the state defendants were acting ultra vires, and, therefore, beyond the protection of the Eleventh Amendment. Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670 (1983); Ex Parte Young, 209 U.S. 123 (1908).

In this regard, there are two questions to be answered. First, were the state defendants acting within the authority apparently delegated to them by the state? And second, if they were, were they stripped of that authority by the supreme authority of federal law? Pennhurst, supra, slip

---

[3]See Pennhurst, supra, slip op. at 12-13, n. 12.

[4]See Edelman v. Jordan, supra, 415 U.S. at 673-674.

op. at 9-12. In this case, there is again no dispute that the state defendants were acting well within the discretion given them under state law. Specifically, they certainly had discretion not to provide readers or other assistance for plaintiffs. Thus, the only remaining question is whether federal law somehow "stripped them of that authority."

Clearly, it did not. Neither the federal programs from which petitioners receive funds nor Section 504 impose any limitations on state law authority. Rather than prohibiting or requiring conduct by state officials, they induce conduct.[5] That is, they reward conduct consistent with their

---

[5] See Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 27 (1981).

provisions by providing states with funding. They do not prohibit conduct; rather, they encourage desired conduct, and sanction undesired conduct by withholding federal funding.[6] Thus, they do not "strip" a state official of his otherwise existing state law authority, and in no way implicate the fiction of

---

[6]In this regard, the Rehabilitation Act provides that the remedies available to those aggrieved by violations of Section 504 shall be those available under "Title VI of the Civil Rights Act of 1964 [42 U.S.C.A. 2000d, et seq.]." 29 U.S.C. § 794a (a)(2). That title provides only for the cut-off of federal funding to the offending program after appropriate federal agency hearing procedures, 42 U.S.C. § 2000d-1. Federal agency action rather than a suit by aggrieved persons against state officials in federal court generally is the appropriate procedure in cases such as this one. See Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 29 (1981); Rosado v. Wyman, 397 U.S. 397 (1970).

Ex Parte Young.[7] Pennhurst, supra, slip op. at 23, n. 25. Accordingly, this is an action against the state in every respect; it is barred by the Eleventh Amendment.[8]

---

[7]Ex Parte Young, of course, involved constitutional violations. In this case the constitutional claims were rejected by the district court and are not pressed here.

[8]This conclusion follows inexorably from the reasoning of Pennhurst and is not barred by any prior decision of the Supreme Court. Specifically, neither Edelman nor Rosado involved an Eleventh Amendment challenge to the exercise of jurisdiction over claims for prospective relief under a federal statute. Rosado did not involve an Eleventh Amendment challenge at all, Edelman v. Jordan, 415 U.S. at 677, n. 18, and in Edelman petitioners "conceded" the propriety of prospective relief. Id. at 664.

CONCLUSION

A writ of certiorari should be issued to review the decision of the Third Circuit.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

By: _____
ANDREW S. GORDON
Senior Deputy Attorney General

MAURA A. JOHNSTON
Deputy Attorney General

ALLEN C. WARSHAW
Deputy Attorney General
Chief, Litigation Section

Counsel for Petitioners

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

DATE: May 14, 1984

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1626

NELSON, MARTIN and BUNTELE, PAULA

and

THOMAS MOBLEY, Intervenor

vs.

THORNBURGH, RICHARD, in his individual and official capacity as Governor of Pennsylvania

O'BANNON, HELEN, in her individual and official capacity as Secretary of Welfare of the Commonwealth of Pennsylvania

STOVAL, DON JOSE, in his individual and official capacity as Executive Director of the Philadelphia County Board of Assistance and

THE COMMONWEALTH OF PENNSYLVANIA

Richard Thornburgh, et al.,
Appellants

Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 81-5115)
District Judge: Honorable Louis H. Pollak

Argued

March 5, 1984

Before: ALDISERT and HIGGINBOTHAM, Circuit Judges, and LATCHUM, District Judge.*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, and for the reasons set forth in the district court opinion by the Honorable Louis H. Pollak, Nelson v. Thornburgh, 567 F.

* Honorable James L. Latchum, of the United States District Court for the District of Delaware, sitting by designation.

Supp. 369 (E.D. Pa. 1983), and in light of Consolidated Rail Corp. v. Darrone, ____ U.S. ____ (Feb. 28, 1984); it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.[1]

Costs taxed against appellants.

BY THE COURT,

(s) Aldisert
Circuit Judge

---

1 We are of the view that Pennhurst State School and Hospital v. Halderman, ____ U.S. ____ (52 U.S.L.W. 4155, Jan. 23, 1984), does not compel a contrary result. Here a federal statute is being construed; in Pennhurst, the Court was construing a state statute.

Attest:

(s) Sally Mrvos
Sally Mrvos, Clerk

DATED: Mar 6, 1984

ENTERED: 7-13-83

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN NELSON, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
RICHARD THORNBURGH, et al.	:	NO. 81-5115
	:	

O P I N I O N

FILED JUL 13 1983

POLLAK, J. JULY 12, 1983

Plaintiffs Martin Nelson, Paula Buntele and Thomas Mobley are income maintenance workers ("IMWs") employed by the Department of Public Welfare ("DPW") of the Commonwealth of Pennsylvania, and assigned to neighborhood offices of the Philadelphia County Board of Assistance ("PCBA"). Defendants, all sued in their official capacities, are Governor Richard Thorn-

burgh, Secretary of Welfare Helen O'Bannon and PCBA Executive Director Dan Jose Stovall.[1]

Plaintiffs are blind. Because their job entails extensive paperwork, they are unable to perform their duties satisfactorily without the aid of a reader. Plaintiffs have therefore hired readers on a part-time basis. With the assistance of these readers, plaintiffs meet the requirements of their position as well as their sighted colleagues.

Plaintiffs, up to now, have borne the expense of these readers, despite requests by plaintiffs and the

---

[1]The Commonwealth, initially named as a party defendant, was dismissed on sovereign immunity grounds in an Order entered on September 13, 1982.

Office of Civil Rights of the Department of Health and Human Services that DPW assume this cost. Plaintiffs claim in this lawsuit that DPW's refusal to accommodate them by providing readers or, in the alternative, mechanical devices capable of helping them accomplish the reading functions, constitutes "discrimination" within the meaning of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, which provides in relevant part:

> No otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance....

Plaintiffs seek declaratory and injunctive relief, as well as damages for reader expenditures made in the past.

Defendants contend that plaintiffs are not "otherwise qualified" within the meaning of section 504 because they do not possess an essential qualification of the IMW position: the ability to read. Alternatively, defendants argue that, even if "otherwise qualified," plaintiffs are not entitled to the accommodation that they seek because the cost of readers or mechanical devices would be an undue hardship on DPW and PCBA. Finally, defendants insist that, even if they are found obligated to assume the cost of accommodating plaintiffs' blindness in the future, this court is without authority to require defendants to reimburse plaintiffs for reader expenses incurred heretofore.

The issues in this case have been fully developed through plain-

tiffs' unsuccessful motion for a preliminary injunction, defendants' partially successful motion for summary judgment, supplemental memoranda on the issue of damages, and a four-day trial. On the basis of the evidence presented, I make the following:

FINDINGS OF FACT

I. The Parties

Plaintiffs Martin Nelson, Paula Buntele and Thomas Mobley, all blind since birth, are employed by DPW as IMWs. Each is assigned to a different district of the PCBA. Defendants Thornburgh, O'Bannon and Stovall have ultimate responsibility for the policies and practices complained of in this lawsuit.

DPW is a department of the Commonwealth of Pennsylvania, charged with administering the federal and state programs, such as cash

assistance, food stamps and medical assistance, designed to aid those in need. See 62 Pa. Stat. Ann. §401. In the fiscal year which ended on June 30, 1983, DPW was authorized to disburse $4,310,000,000; of this sum, a little under half came from the federal government through block grants. An additional $300,000,000 is devoted to administering the funds, $141,000,000 of which is contributed by the federal government. Eighty percent (80%) of the administrative budget is used to pay salary and benefits for DPW's 38,000 employees.[2]

Since 1979, budgetary constraints have considerably reduced the work-force of the county assistance

---

[2] 8,900 of the Department's employees work in county assistance offices scattered across the state. 3200 of these employees work in Philadelphia County.

offices, including the offices in Philadelphia County administered by the PCBA. For instance, 160 clerical employees have been furloughed in Philadelphia County, and a hiring freeze has been in effect since 1979. During that same period, caseloads have increased by about 100,000 cases statewide, with a proportional increase in Philadelphia. This combination of diminished resources and enlarged responsibilities has resulted in a growing backlog of work in many offices, increasing the strain on clerical, caseworker and supervisory employees.

II. The Functions of the IMW

The IMW is, as a rule, the only point of contact between the individual recipient and the massive apparatus of the state and federal welfare system. Historically, the focus of the IMW's

responsibilities was on social work: accompanying the provision of material aid with counselling and referrals to other helping agencies (e.g., vocational training programs). The caseworker, as the IMW used to be known, interviewed the client, sometimes in a home visit, and then described in a narrative the results of the interview and the reasons for granting or denying aid.

By the mid-1970's the nature of the job had shifted away from traditional social work. The central function of the job is now the determination of the client's initial and continued eligibility for federal and state benefits. The practice of reporting the outcome of the interview through a narrative recital is a casualty of this trend; it has been almost fully replaced by computerized standard

forms. The standard forms are designed to maximize efficient processing of benefits and minimize mistakes by making it easier to control the IMWs' discretion and keep the client files uniform.

The principal form used by the IMW in the interview with the client is the "743," part of the "121 series" adopted by DPW in the mid 1970's. The IMW elicits from the client all the information required by the five-page form, which includes everything relating to the client's financial, vocational and family situation that could conceivably bear upon the question of eligibility.[3] DPW's normal procedure calls for the IMW to copy this information by hand on the

---

[3]These interviews now generally take place in the district office, as DPW is attempting to phase out home interviews whenever possible.

appropriate block of the 743 form. Depending on the client's situation, the IMW may also have to fill out other forms, such as a food stamp application worksheet or a child support form. During the interview, the IMW often will have to review documents provided by the client. Some documents, such as rent receipts, are used to verify the client's address; other, such as medical reports, are used to evaluate the client's medical fitness for work, an important component of the eligibility requirement.

After a form is completed, the IMW hands it to the client for review. If the information is correct, the client signs the form. The typical IMW spends about half the day conducting interviews.

After the client leaves the office, the IMW makes the determination

of eligibility for benefits. To do this, the IMW consults the DPW Income Maintenance Manual ("the Manual"). The Manual is over one thousand pages long, and filled with regulations, procedures, charts and tables. New materials are added to the Manual almost daily, reflecting changes in the amount of aid or the policies affecting its distribution.[4] From the standards contained in the Manual, the IMW determines if the information on the 743 entitles the client to receive or continue to receive benefits.[5] Some

---

[4]The IMWs attend frequent training sessions at which they learn about changes in the Manual.

[5]For redeterminations of eligibility, required to take place every six months for each client, the IMW follows the same basic procedures as in the initial determination of eligibility. Prior to the redetermination interview, however, the IMW must take the added step of reviewing the case file in search of factors, such as the possibility of new income sources, that may affect eligibility.

of the benefits are distributed under federal programs, such as Aid to Families with Dependent Children, Old Age Assistance, and foodstamps. Other benefits exist under state programs, like General and Medical Assistance.

After determining eligibility under these programs, the IMW fills out an instruction sheet encoding the decision on the amount of benefits, and sends it with the 743 to the clerical department. The clerical staff then enters all the data into the central computer.

The IMW must then perform the post-interview procedures, which include completing forms in order to update client information, sending copies of forms to appropriate offices and personnel and notifying the client of DPW's decision on his or her eligibility.

Another important function of the IMW is attending to "special projects." Special projects are undertaken at the direction of higher level administrators and are designed to correct errors that may have escaped scrutiny in individual cases. For example, the IMW may receive a list of his or her clients who receive Social Security benefits as well as assistance, to determine whether that income source was disclosed at the time of the eligibility decision. Or, the IMW may receive a list of clients receiving more than the maximum grant or less than the minimum, and be asked to justify or rectify the discrepancy.

The IMW must also be prepared to handle client emergencies by being able to calm distraught clients, replace lost checks, or track down bureaucratic error.

Changes in the last ten years have operated to limit the range of discretion associated with the IMW position. Yet the IMW remains a professional-level position, with significant responsibilities. The capacity to read without aid is certainly helpful in carrying out the duties of the job, as are the abilities to hear or to move about without help. The essential qualifications for this career, however, are dedication to the work, sufficient judgment and life-experience to enable one accurately to assess the legitimate needs of clients, and the ability to work effectively under the pressure of competing demands from clients and supervisors.

III. THE BLIND IMW

A. The Plaintiffs' Experiences

With the aid of readers, plaintiffs perform their job as well as

sighted IMWs. By employing readers on a part-time basis, plaintiffs have earned fully satisfactory evaluations from their supervisors.

The experience of plaintiff Martin Nelson as a blind IMW is typical of the other plaintiffs, with relevant differences noted in footnotes. Mr. Nelson came to work for DPW in 1970,[6] and has employed a reader on a part-time basis since that time. As long as records were being kept in narrative form, Mr. Nelson's need for a reader was limited, for the narratives were dictated into a machine and then transcribed by the typing pool. With the advent of the standarized form, demanding meticulous attention to detail, Mr. Nelson's use of a reader increased

---

[6]Mobley began work in 1975, Buntele in 1972.

dramatically. He currently uses his reader an average of 32.5 hours per week.

Mr. Nelson pays his reader $3.80 per hour, spending approximately $480 per month for reader salary, or about $5,100 per year. Mr. Nelson earns $21,379 in salary, plus fringe benefits of about $4,000.[7] Plaintiffs are able to afford a reader on their salary because they receive $316 per month in Supplemental Security Income (SSI). They receive SSI benefits to help defray work-related expenses that result from their blindness. That portion of the reader expenses not covered by SSI is paid out of salary, and is tax

---

[7]Mr. Mobley, who also earns $21,379 per year, employs two part-time readers, costing him $1,000-$1,200 per year. Ms. Buntele earns $22,804 per year, and employs a reader five hours per day, at a cost of $100 per week.

deductible. Were the SSI benefits to cease, plaintiffs would be unable to employ readers.

When conducting a client interview, Mr. Nelson uses his reader to fill out the forms according to his instructions and to read aloud any documents the client may have brought in. Mr. Nelson takes notes of the interview in braille, with a slate and stylus.[8] After the form is completed, Mr. Nelson confirms that the information given is accurately inscribed, and then has the client sign the form. Mr. Nelson later has his reader review specific sections of the Manual in order to determine

---

[8]A slate is a small sheet of hinged metal inscribed with a series of dots, corresponding to the braille alphabet. After inserting paper into the slate, a piercing too known as a stylus is used to punch the raised dots onto the paper and thus encode information.

eligibility. The reader also helps Mr. Nelson carry out the special projects.

When the reader is not there, Mr. Nelson reviews his file of brailled client cards.[9] But, as Mr. Nelson testified, after he has organized his work, "there are times when time lies rather heavily on my hands," and all there is left to do is "read two or three articles of National Geographic." N.T. 133-34

Ms. Buntele follows a procedure similar to Mr. Nelson's and, like Mr. Nelson, experiences periods of inactivity when the reader is not present. On the other hand, Mr. Mobley, by varying the routine slightly, has been able to reduce significantly both his demand for a reader and his idle time. Mr.

---

[9]The card contains the name, address, and last and next date of redetermination.

Mobley schedules his interviews with clients for the afternoons. Like Mr. Nelson, he takes notes on a slate and stylus. But Mr. Mobley's reader is not present during interviews.[10] His reader works mornings, helping Mr. Mobley to fill in the 743 and the instruction sheet for the previous day's interviews. The client returns sometime during that day, or soon thereafter, to verify and sign the completed form. By following this procedure, Mr. Mobley needs a reader for only four hours per day.

B. The Demand for Readers and DPW's Response

As DPW's increased use of

---

10 Mr. Mobley's testimony did not address how he examines documentary evidence. That problem is presumably handled by asking co-workers for help, by copying the documents, or by retaining the documents until the reader comes in the next day.

standardized forms spawned the plaintiffs' increased use of readers, each plaintiff separately requested that DPW assume the reader expenses. When informal attempts to reach a settlement on the issue proved futile, Nelson filed a complaint in July 1980 with the Office of Civil Rights (OCR) of the Department of Health and Human Services. Buntele filed a similar complaint a few months later. On investigating these complaints, OCR concluded that DPW was not in compliance with section 504's implementing regulations because it was not providing the complaintants and other blind IMWs with sufficient accommodation. OCR requested that DPW reimburse blind employees for past and current reader expenses pending creation of a civil service position of reader. DPW refused to comply and efforts at

reaching a negotiated settlement failed.

In October or November, 1981, plaintiffs met with representatives of the PCBA to discuss possible accomodations. Plaintiffs requested that DPW either provide them with readers, or restructure the IMW position to reduce the need for readers by, for example, brailling the Manual, forms and training material, or by allowing the IMWs to type or dictate client information. Marie DeLuca, Deputy Executive Director of PCBA, directed a study of the feasibility of plaintiffs' requests. She determined that providing readers or brailling the Manual would be prohibitively expensive, and that modifying the standard form would impede accuracy and efficiency. She did not consult any rehabilitative experts before

reaching her decision.[11]

PCBA has taken some steps to accommodate plaintiffs. For example, they are supplied with braille paper, and supervisors seem to make a special effort to review their work. During training sessions, supervisors spend extra time instructing plaintiffs on changes in the Manual or procedures to be followed on a special project. Mr. Nelson is supplied with a typewriter, and he was given some special consideration when caseloads were redistributed. These accommodations, though helpful, are insufficient to allow plaintiffs to perform the essential functions of their job without readers.

---

[11] Ms. DeLuca's decision not to provide readers for the plaintiffs was endorsed by Secretary O'Bannon. The essence of the Secretary's position is that it is wasteful to have "two people doing one person's work." Trial deposition of O'Bannon at 22.

C. Types of Accomodation

Three expert witnesses testified concerning the methods and costs of accommodating the plaintiffs to enable them to perform the essential functions of their job. John Halverson and Patrick Camorato testified on behalf of plaintiffs; Frederick Noesner testified on behalf of defendants. All three are blind and all three presented impressive credentials in the field of workplace accommodations for the blind.

The experts' testimony, in sum, suggested four types of accommodation DPW could pursue:

(1) The first may more accurately be called an "alternative technique" than an accommodation, N.T. 87, for it involves relatively costless adjustments in the agency's procedures. One such technique would be to braille the forms to make them easier

for a blind IMW to follow and explain to a reader. Another such technique would be to allow blind IMWs to require clients to return the next day to sign the face sheet of the 743, enabling the IMWs to conduct interviews without the presence of a reader, as Mr. Mobley already does.

(2) A second type of accommodation would be to print the thousand-page manual in braille. The cost of brailling fifty copies of the Manual - enough for blind IMWs throughout the state - would be approximately $34,000.

(3) A third type of accommodation is technological: DPW could purchase one of a number of kinds of new machines that combine microchip technology and braille. The most promising of these inventions is the Versabraille. The Versabraille is a port-

able[12] mini-computer that uses a standard cassette to store and retrieve information in braille.

Versabraille information is organized by chapters, pages and paragraphs. The blind IMW could use the Versabraille to encode all the information gathered from a client interview by plugging in the name of the client as the chapter, and the specific information - say eligibility for food-stamps - as a page. The blind IMW could later "read back" the information by recalling the name of the client and "foodstamps," and touching the display. The display is the "readout" on the Versabraille. Dots raised on the plastic display represent twenty braille characters at one time. For

---

[12] The Versabraille measures 14" x 9" x 5", and weighs 11 pounds.

the next twenty characters the blind IMW would merely press the advance bar.

The Versabraille, if linked with a printer, also has the capability of transcribing from the braille into the English alphabet. This feature could enable the IMW to arrange the information received during the interview into the order required by a standard form, and print out that information directly onto the form.

Additionally, it is quite possible that the Versabraille could be linked to the existing DPW computer system. This would allow the IMW to enter information directly into, or take information from, the DPW data base. When the Manual is computerized, the Versabraille could encode it into

paperless braille.[13]

Each Versabraille would cost at most $7,000, plus $700 for a printer. A maintenance contract would cost another $700 per year. Because they already know braille, the plaintiffs in this case could learn to use Versabraille in two or three days.[14]

The Versabraille would substantially reduce the need for a reader but it would not eliminate it entirely. Handwritten documents would still re-

---

13 The Versabraille has been used with success by the Social Security Administration, the Internal Revenue Service, and Bell of Pennsylvania.

14 Other devices of recent invention are equally ingenious, though less well suited to meet these plaintiffs' needs. One is an Opticon, which can scan typewritten material and convert it to braille. There is also a voice computer able to read and pronounce, although imperfectly, typewritten script. These machines, however, are not portable and have no memory.

quire reading, as would mail and material not produced by or entered into the DPW computer.

(4) The fourth type of accommodation is providing a reader.

D. The Cost of Reasonable Accommodation

Of the four types of accommodation referred to above, the provision of readers is required to enable a blind IMW to perform the essential functions of the position. But a full-time reader is not required, because it is not necessary to have a reader in attendance while determination and redetermination interviews are being conducted. Those interviews consume approximately half of a working day. If the PCBA were to permit each blind IMW to function as Mr. Mobley does, a blind IMW could gather client information one day and, on the following

day, use the reader to prepare the form, with client verification on that day or soon thereafter. By using this method a blind IMW could perform the essential functions of the job by using a reader four hours a day or less. During the rest of the day, a person capable of serving as a reader should be "on call" on an emergency basis.

Assigning a clerical worker already in the office to double as a reader would seem the most sensible method of accommodation . That clerk/reader could spend approximately half the day attending to reading duties. During the other half of the day, the clerk/reader could perform clerical tasks, but be available to serve as a reader whenever truly necessary.

The Clerk Typist I - the basic clerical position within the DPW - earns $13,276 per year. Since

plaintiffs could perform the essential functions of their position if DPW supplied each of them with a half-time reader, the cost of accommodation would be approximately half the salary of a Clerk Typist I, or roughly $6,638 per year for each plaintiff.

Adoption of the first two types of accommodations - changing agency procedures and brailling the Manual - could enhance the efficiency and productivity of readers, and thus lower the cost of accommodation. Investment in the third type of accommodation - new technology and most particularly the Versabraille - could also be expected to lower the cost of accommodation by significantly reducing the blind IMW's dependence on the availability of readers. None of these accommodations, however, would eliminate entirely the need for readers.

Assuming accommodation is found to be required as a matter of law, it will be up to defendants to determine whether readers alone would be utilized or whether use would also be made of one or more of the other types of accommodation. If defendants were to employ other accommodations in addition to readers, the governing principle would be that the aggregate remedial package would, as to each plaintiff, be as effective as providing each of the plaintiffs with (a) daily access to a reader for half of the working day, and (b) emergency access to a reader as required during the other half of the working day.

DISCUSSION

Three issues are raised by plain-

tiffs' claims.[15] The first is whether plaintiffs are "otherwise qualified" within the meaning of Section 504. If they are, next to be decided would be whether the accommodation required to enable plaintiffs to perform the essential functions of their job - half-time readers or their equivalent - would be reasonable, or whether it would instead impose an undue hardship on DPW and the PCBA. Finally, if that accommodation is reasonable, the question would be raised whether plaintiffs are entitled to damages for

---

15 Two issues yet to be decided by the Supreme Court have been resolved in the Third Circuit. The first is that section 504 creates a private right of action, NAACP v. Wilmington Medical Center, 599 F.2d 1247 (3d Cir. 1979). The second is that this right of action exists whether or not the primary purpose of the federal assistance is to provide employment. LeStrange v. Consolidated Rail Corp., 687 F.2d 767 (3d Cir. 1982), cert. granted, 51 U.S.L.W. 3598 (U.S. February 22, 1983).

past reader expenditures, or are instead barred from recovering by one of a number of statutory and constitutional doctrines.

I. Otherwise Qualified

Section 504 prohibits only "otherwise qualified" individuals from being discriminated against by reason of handicap. Plaintiffs contend that they are "otherwise qualified" because, with accommodation, they are able to perform all the job functions associated with the IMW position. Defendants respond by arguing the following syllogism: plaintiffs are "otherwise qualified" only if they possess all the abilities necessary to perform their job; that one of the most important abilities for the IMW to possess is the ability to read; that plaintiffs cannot read; and therefore that plaintiffs are not "otherwise qualified."

The legislative history of the Rehabilitation Act does not explain the Congressional intent in choosing the phrase "otherwise qualified." However, the Supreme Court, in Southeastern Community College v. Davis, 442 U.S. 397 (1979), has closely examined the meaning of the phrase. Davis, a unanimous opinion, remains the only directly relevant Supreme Court decision. It therefore provides an appropriate starting place for analysis of the issues posed in the present controversy.

A. Davis

Francis Davis suffered from a hearing disorder. By wearing a hearing aid, she was able to detect the presence of sounds almost as well as a person with normal hearing, but still had trouble locating the source of the sounds or discriminating among them

sufficiently to understand spoken speech. She therefore had to rely primarily on her lipreading skills for oral communication.

Ms. Davis hoped to be trained as a registered nurse. To achieve that ambition, she enrolled during the 1973-74 academic year in Southeastern Community College's Parallel Program: a program designed to fulfill the prerequisites for the College's Associate Degree Nursing Program. Upon completing the Parallel Program, however, Ms. Davis was refused entry into the nursing program. The decision, made after considerable deliberation, was based on plaintiff's handicap.

Ms. Davis brought suit under Section 504. The district court, after a hearing, analyzed her claim first by defining "otherwise qualified" in this

context to mean "otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." 424 F.Supp. 1341, 1345 (E.D.N.C. 1976). The court then found that Ms. Davis would pose a potential danger as a student or registered nurse because a patient or doctor might be unable to secure her attention and be quickly understood in a medical emergency. Because Ms. Davis could not under certain circumstances perform her functions safely, she could not perform them sufficiently. Therefore, she was not "otherwise qualified," and judgment was entered for the defendant.

The Court of Appeals for the Fourth Circuit reversed. Relying upon its interpretation of regulations newly

promulgated by the Department of Health and Human Services (then, the Department of Health, Education and Welfare), the Fourth Circuit held that "otherwise qualified" meant qualified "without regard" to handicap. The case was ordered remanded to the district court to consider whether Ms. Davis met all the other criteria for admission. If she did, the college must accept her, modifying its program in whatever ways were necessary in order to accommodate her handicap. 574 F.2d 1158, 1160-62 (1978).

The Supreme Court, speaking through Justice Powell, reversed. After reviewing the proceedings and opinions below, and examining the language of the statute and the implementing regulations, the Court endorsed the district court's view of the meaning of

"otherwise qualified": "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." 442 U.S. at 406. Because plaintiff could not meet these requirements, she was not "otherwise qualified."

Justice Powell's opinion then went on to consider whether the nursing program requirements might be modified to accommodate Ms. Davis. The Court first noted that even the most radical alteration in the program would avail Ms. Davis little, for while the paramount concern for patient safety demanded that Ms. Davis be closely supervised in her practical training, such supervision would frustrate the program's goal of encouraging the assumption of responsibility. Moreover, the Court found that Section 504 re-

quires no "affirmative action" - that is, no modifications "in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals." Id. at 410. The Court then acknowledged the fineness of the line it was drawing "between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons." Id. at 412. The Court explained:

> It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.

Id. The Court then charged the Department of Health and Human Services with the "important responsibility" of "[i]dentification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped." Id. at 413.

B. Applying Davis

A useful framework for evaluating a handicap discrimination claim after Davis is advanced in a student note, Accommodating the Handicapped: The Meaning of Discrimination under Section 504 of the Rehabilitation Act, 55 N.Y.U.L.Rev. 881 (1980)(Accommodating the Handicapped). The analysis, adopted by the Fifth Circuit in Prewitt v. United States Postal Service, 662

F.2d 292,305 (1981),[16] points out that the handicapped face four types of barriers to equality in the employment area. Two types of barriers - social bias and disparate impact from neutral standards[17] - are common to any member of a disfavored group. Two other types of barriers, however, are unique to the handicapped, for these barriers result from the nature of the

---

16 Both Accommodating the Handicapped and Prewitt rely in part on two other scholarly pieces: Gittler, Fair Employment and the Handicapped: A Legal Perspective, 27 De Paul L.Rev. 953 (1978) and Note, Accommodating the Handicapped: Rehabilitating Section 504 after Southeastern, 80 Colum. L.Rev. 171 (1980).

17 An example of a neutral-standards barrier is a rule against allowing dogs into a federal courthouse, which would operate to impair a blind lawyer relying on a seeing-eye dog. See also Majors v. Housing Authority, 652 F.2d 454 (5th Cir. 1981)(housing project may have to permit exception to "no pet" rule for woman with acute psychological dependency on her dog).

handicap in combination with the requirements of the position in question. One type is "surmountable impairment barriers," referring to barriers to job performance that can be fully overcome by accommodation. The other is "insurmountable employment barriers," where the handicap itself prevents the individual from fulfilling the essential requirements of the position.

Davis presents an example of an insurmountable employment barrier, because the ability to hear is an essential requirement for a nurse in order to insure patient safety. Thus Davis at least stands for the proposition that an individual facing an insurmountable barrier is not "otherwise qualified" within the meaning of Sec-

tion 504.[18]

Davis also teaches that an individual facing a surmountable employment barrier is not "otherwise qualified" if accommodation would require a substantial modification in the requirements of the position, or would result in an undue administrative or financial burden upon the federally assisted

---

[18]Two recent cases in this court have relied on this strand of Davis in ruling that plaintiffs do not fit within the definition of "otherwise qualified." In Strathie v. Department of Transportation, 547 F.Supp. 1367 (E.D. Pa. 1982), Judge Ditter ruled that a hearing-impaired school bus driver was not otherwise qualified within the meaning of the Act, because his inability to localize sounds meant that he could not perform two necessary functions of his position: insuring control over and safety for the riders. Id. at 1381. In Bey v. Bolger, 540 F.Supp. 910 (E.D. Pa. 1982), Judge Bechtle held that plaintiff, who suffered from uncontrolled hypertension and cardiovascular disease, could not safely perform even light duties with the Postal Service without endangering his health and safety. Id. at 926.

program sought to be charged pursuant to Section 504. The Court characterized accommodations which it considered excessive as "affirmative action." 442 U.S. at 410, 412.

There is no claim in the present case that accommodation of these plaintiffs would entail substantial modifications of the requirements of the position, or impose a new administrative burden on DPW. The claim is simply that the accommodation called for would cost too much. Thus, the arguments over "otherwise qualified," "reasonable accommodation," "undue burden" and "affirmative action" all collapse into one issue: would the cost of providing half-time readers be greater than the Act demands?

II. Reasonable Accomodation/Undue Burden

A. The Administrative Regulations

Davis describes the parameters in which a solution to the problem must be found, but does not resolve it. To advance the inquiry whether unwillingness to accommodate amounts to discrimination, Davis instructs that the administrative regulations implementing Section 504 should be examined. Administrative regulations, if consistent with the purposes of the statute, are entitled to judicial deference. Davis, 442 U.S. at 412. And they deserve particular deference where, as here, the proper resolution of the case cannot be deduced by logical process from the words of the statute, but must instead represent a quantitative judgment: a quasi-legislative compromise between competing interests.

The HHS regulations that bear on

the issue in this case are the product of an extended rule-making process carried out in 1976 and 1977.[19] Now codified at 45 C.F.R. §84.1 et seq. (1982), these regulations reflect a conscious effort at balancing the needs of the handicapped with the budgetary

---

[19] After the District Court for the District of Columbia ordered that regulations be promulgated, Cherry v. Matthews, 419 F.Supp. 922 (D.D.C. 1976), the Secretary, in May of 1976, published a Notice of Intent to Issue Proposed Rules, with a draft of those rules enclosed. 41 Fed. Reg. 20,296 (1976). More than 300 written comments were received in response. In addition, a series of ten meetings were conducted at various locations across the country. See 42 Fed. Reg. 22,676 (1977).

In July of 1976, the Secretary issued a Notice of Proposed Rulemaking, with proposed regulations, revised in light of the comments received. 41 Fed. Reg. 29,548 (1976). Another 850 comments were received, supplemented by 22 public meetings. After assessment of all this information, the final regulations were promulgated on May 4, 1977. 42 Fed. Reg. at 22,676-77.

realities of programs receiving federal funds.

The regulations define a "qualified handicapped person" as one who "with reasonable accommodation, can perform the essential functions of the job in question." Id. at §84.3(k)(1). As examples of reasonable accommodations, the regulations include: "job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions." Id. at §84.12(b)(2)(emphasis added).

The recipient must make such accommodations unless it "can demonstrate that the accommodation would impose an undue hardship on the operation of its program." Id. at §84.12(a).

The regulations do not spell out precisely how that showing can be made, but they do list the following "factors to be considered" in the determination of undue hardship:

> (1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;
> (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and
> (3) The nature and cost of the accommodation needed.

Id. at §84.12(c)(1-3). In addition, Appendix A to the regulations illustrates how these factors would be applied in determining whether the recipient of federal funds has discharged the burden of showing undue hardship:

> The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a

> small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearings but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.

Appendix A - Analysis of Final Regulations, 45 C.F.R. §84 at 300 (emphasis added).

Applying the regulations to the facts of this case reveals that the answer called for by the regulations is clear. "[T]he provision of readers" is an express HHS example of reasonable accommodation. Moreover, in view of DPW's $300,000,000 administrative

budget,[20] the modest cost of providing half-time readers, and the ease of adopting that accommodation without any disruption of DPW's services, it is apparent that DPW has not met its burden of showing undue hardship. To be sure, DPW's financial resources are limited. But there is no principled way of distinguishing DPW on this basis from the large school district employing an aide for a blind teacher, or from the state welfare agency providing an interpreter for a deaf employee.[21] For all these reasons, accommodation must be provided unless these regula-

---

[20]DPW allocates $600,000 tor travel reimbursement for County employees alone. O'Bannon at 41.

[21]The United States has filed an amicus brief in support of interpreting these regulations to require accommodation of these plaintiffs.

tions "constitute an unauthorized extension of the obligations imposed" by Section 504. Davis, 442 U.S. at 410. To that question we now turn.

B. Congressional Intent

Nothing in the legislative history of section 504 suggests that regulations requiring reader accommodation should be considered beyond the scope of the statute. While the 1973 Rehabilitation Act is silent on the subject of monetary expenditures,[22] the 1978

---

[22]As one court has noted, "this may be more the result of Congressional inattention to the costs of implementing the policy of nondiscrimination announced in section 504 than a Congressional determination that such expenditures would not be necessary to effectuate that policy." American Public Transp. Assoc. v. Goldschmidt, 485 F.Supp. 811, 826 (D.D.C. 1980).

amendments to the Act[23] strongly suggest that Congress was well aware that compliance with Section 504 could be costly, and that Congress was prepared to underwrite a part of that price. Section 115(a) of the 1978 Amendments calls for grants to states to establish and operate comprehensive rehabilitation centers. Part of the mandate of these centers is to provide "to local governmental units . . . such information and technical assistance (<u>including support personnel such as interpreters for the deaf</u>) as may be necessary to assist those entities

---

[23]The Rehabilitation Act of 1973 was substantially amended by the Rehabilitation, Comprehensive Services, and Development Disabilities Amendments of 1978, Pub.L. No. 95-602, 92 Stat. 2955 (codified in scattered sections of 29, 32 and 42 U.S.C.).

in complying with this chapter, particularly the requirements of section 794 [section 504]." 29 U.S.C. § 775(a)(2) (emphasis added).

That Congress expressed no disapproval of the regulations defining reasonable accommodation and undue burden, which were promulgated prior to the 1978 amendments, may also be regarded as evidence that Congress understood that combating discrimination against the handicapped would cost money. Cf. Bob Jones University v. United States, 51 U.S.L.W. 4593, 4600-01 (May 24, 1983) (Congressional failure to modify well-known administrative regulations may be viewed as Congressional endorsement of agency's interpretation of statute).

C. The Case Law

Cases interpreting section 504 have uniformly recognized that preventing discrimination against the handicapped may mean that recipients of federal funds will have to expend funds of their own. The Davis Court recognized that "on occasion the elimination of discrimination might involve some costs." 442 U.S. at 411 n.10. While the Third Circuit has not directly addressed the issues posed in this litigation,[24] cases from other Circuits

---

[24] Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977), cert. denied, 450 U.S. 923 (1981), affirmed the lower court's ruling that the School District of Philadelphia discriminated against a blind teacher when it refused to award her seniority status dating from the time she first attempted to secure a teaching position and was denied appointment because of her handicap. The Court of Appeals relied on an "irrebuttable presumption" analysis rather than section 504, because the Rehabilitation Act had not been passed at the

FOOTNOTE CONTINUED ON NEXT PAGE

support the conclusion reached here.

A recent example of such a case in the field of transportation is Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982). In Dopico, plaintiff, representing a class of wheelchair - bound handicapped persons, sued the New York City transportation system seeking to make the system accessible to them. Judge Weinfeld had dismissed the claim for failure to state a cause of action, because, under Davis, the plaintiffs were not entitled to the "massive relief" they were seeking under section 504. 518 F.Supp. 1161, 1175 (S.D. N.Y. 1981). The Second Circuit, speaking through Judge Newman, reversed, point-

---

FOOTNOTE CONTINUED FROM PREVIOUS PAGE

time the discrimination took place. See id. at 188. It bears noting, however, that the teacher would require a full-time teacher's aide.

ing out that even if plaintiffs could not prevail in their attempt to overhaul the entire transportation system of the city, they still may be entitled to some relief under section 504: "We believe that section 504 does require at least 'modest, affirmative steps' to accommodate the handicapped in public transportation. Every court that has considered the question has concluded as much." 687 F.2d at 652 (quoting American Public Transit Assoc. v. Lewis, 655 F.2d 1272, 1278 (D.C. Cir. 1981)). In remanding the case, Judge Newman called upon the lower court to give weight to the regulations implementing section 504. See also United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

The Fifth and Tenth Circuits have also interpreted Davis as requiring that states spend money to bring about reasonable accommodation. In Camenisch v. University of Texas, 616 F.2d 127 (1980), the Fifth Circuit affirmed an order requiring the University of Texas to procure and compensate an interpreter to assist a deaf graduate student in his classes. Although the Supreme Court vacated the opinion as moot without reaching the merits of the section 504 issue, 451 U.S. 390 (1981), the panel's reasoning was endorsed in subsequent Fifth Circuit opinions: Majors v. Housing Authority, 652 F.2d 454 (1981), Tatro v. Texas, 625 F.2d 557 (1980) (Tatro I) and Tatro v. Texas, 703 F.2d 823 (1983)

(Tatro II).[25] In New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982), the Tenth Circuit held that section 504 may require the state to modify its educational system to accommodate its retarded schoolchildren by providing them with, inter alia, occupational, physical and speech therapy services. The case was remanded to the district court to consider whether the financial burden of such accommodation would be "excessive" under the guidelines set forth in Davis.

---

[25] In Tatro II, a panel of the Fifth Circuit upheld the district court's order requiring the school district to accommodate a schoolchild who had to be catheterized several times daily.

D. Conclusion

I conclude that accommodating plaintiffs to enable them to perform the essential functions of their position is consistent with the mandates of section 504 and with the administrative regulations and case law interpreting it. I am not unmindful of the very real budgetary constraints under which the DPW and PCBA operate, and recognize that accommodation of these plaintiffs will impose some further dollar burden upon an already overtaxed system of delivery of welfare benefits. But the additional dollar burden is a minute fraction of the DPW/PCBA personnel budgets. Moreover, in enacting section 504, Congress recognized that failure to accommodate handicapped individuals also imposes real costs upon American society and the American economy. But for the fortuitous availability of

supplemental benefits from the federal government - benefits which heretofore have enabled plaintiffs to hire and pay readers on their own - these plaintiffs, despite their education, experience and commitment, would have been barred by their handicap from the position of IMW, where they now serve as examples of how handicaps can be overcome. When one considers the social costs which would flow from the exclusion of persons such as plaintiffs from the pursuit of their profession, the modest cost of accommodation - a cost which seems likely to diminish, as technology advances and proliferates - seems, by comparison, quite small.[26]

---

[26]It is worth noting in this connection that DPW considers employable, and thus ineligible for benefits, handicapped applicants for public assistance who are "fully employable with reasonable accommodation." Reasonable accommodation

FOOTNOTE CONTINUED ON NEXT PAGE

III. Damages

The decision to grant injunctive relief raises the question whether plaintiffs are also entitled to damages for past reader expenditures. That question has two subparts. Does section 504 create a private cause of action for damages? If so, is the recovery of damages against an agency of the state nevertheless barred by the Eleventh Amendment to the United States Constitution?

FOOTNOTE CONTINUED FROM PREVIOUS PAGE.

for this purpose is defined as "structural modifications, modified work schedules, acquisition or modification of equipment or devices, provision of readers or interpreters, job restructuring and other similar actions." N.T. 195; Ex. P-35 (emphasis added). It does not seem wholly unfair to impose upon DPW the same requirements that DPW apparently imposes upon its clients and their would-be employers.

A. Damages under Section 504

The touchstone of deciding whether a statute creates a private right of action is legislative intent. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979). With near unanimity, the courts have inferred from the legislative scheme Congress' intent to create a private right of action under section 504. Unfortunately, there is no legislative history instructive on the extent of the remedy Congress intended to make available to a private plaintiff in a section 504 action. In the absence of legislative guidance, the courts have split on the issue of whether the remedy is limited to injunctive relief or also includes a right to collect damages.

The courts holding that no damage remedy for violations of section

504 was intended by Congress view the legislative plan as relying primarily on governmental enforcement of the rights of the handicapped, with the ultimate remedy of cutting off federal funds to recipients engaging in discrimination. Further, it is argued that implying a damage remedy which could reach massive proportions might discourage the acceptance of federal funds, working against the goal of expanded workplace opportunities for the handicapped. Ruth Anne M v. Alvin Independent School District, 532 F.Supp. 460, 473 (S.D. Tex. 1982); Boxall v. Sequoia Union High School, 464 F.Supp. 1104 (N.D. Ca. 1979).

Cases deciding that private plaintiffs may collect damages reason that the availability of a damage remedy increases the deterrent effect of the non-discrimination law. The

opinions also rely on the seminal case of Bell v. Hood, 327 U.S. 678 (1946), for the proposition that where a federal right has been invaded, the courts are normally empowered to use any available remedy to make good the wrong done. Id. at 684. Assuming Congressional awareness of this principle, these cases interpret the lack of legislative discussion as tacit acceptance of the presumption "that a wrong must find a remedy." Meiner v. Missouri, 673 F.2d 969, 978 (8th Cir.), cert. denied, ___ U.S. ____, 103 S.Ct. 215 (1982); Hutchings v. Erie Library Bd. of Directors, 516 F.Supp. 1265, 1268-69 (W.D. Pa. 1981); Patton v. Dumpson, 498 F.Supp. 933, 939 (S.D. N.Y. 1980); Poole v. South Plainfield Bd. of Ed., 490 F.Supp. 948 (D. N.J. 1980).

I am persuaded by the perception of the legislative scheme and the reasoning put forward in the second group of cases. The Supreme Court has stated that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969). Congress certainly has the power to limit remedies if it so chooses. In the absence of any indication that Congress intended to exercise that power to create a limited remedial scheme for section 504, it is a fair canon of statutory interpretation to indulge the presumption that Congress intended that the full panoply of remedies be available to the private plaintiff under section 504.

B. The Eleventh Amendment

Mere presumptions and canons of statutory construction will not, however, suffice to overcome the Eleventh Amendment. That Amendment normally operates to bar the recovery of damages in an action if judgment would be collected against the state, even where, as here, the state is not named as a party. Edelman v. Jordan, 415 U.S. 651, 663 (1974) (§ 1983 does not abrogate Eleventh Amendment).

Plaintiffs do not dispute that a recovery of damages against the named defendants in reality would come from the state. Their primary argument is that Congress has acted to abrogate the Eleventh Amendment when it passed

section 504.[27] There is no doubt that Eleventh Amendment protections may be overridden when Congress acts within its grant of plenary power under section 5 of the 14th Amendment. Hutto v. Finney, 437 U.S. 678 (1978)(Attorney's Fees Awards Act abrogates Eleventh Amendment); Fitzpatrick v. Bitzer, 427 U.S. 445, 447 (1976) (Title VII of the 1964 Civil Rights Act abrogates Eleventh Amendment). Assuming arguendo that section 5 is the source of section

---

[27]Plaintiffs also characterize their request for relief as equitable rather than compensatory. But no matter how labelled, any payment ordered would represent a remedy for a past violation of section 504. Retrospective relief is not available against a state, unless the Eleventh Amendment has been abrogated. Edelman, 415 U.S. at 668-669; Quern v. Jordan, 440 U.S. 332, 338 (1979).

504,[28] respect for the constitutional status of the principle of state sovereignty embodied in the Eleventh Amendment requires at least persuasive legislative history that Congress intended to abrogate the Amendment. Here, the legislative silence does not speak louder than the words of the Eleventh Amendment, and plaintiff's claim for damages must fall. Meiner v. Missouri, 673 F.2d at 982.

---

[28]Defendants contend that section 504 was passed pursuant to Congress' spending power, because it reaches only recipients of federal funds. While Congress may abrogate the Eleventh Amendment by conditioning the receipt of federal funds on a state's surrender of Eleventh Amendment immunities, it must do do expressly. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981); Employees v. Dep't of Health and Welfare, 411 U.S. 279, 285 (1973). If Congress were viewed as acting under its spending power in passing section 504, the clear statement of intent to waive the Eleventh Amendment required of Congress would be lacking.

CONCLUSIONS OF LAW

In light of the preceding findings of fact and discussion, I conclude that:

(1) This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343;

(2) Plaintiffs are "otherwise qualified" within the meaning of section 504 of the Rehabilitation Act, 29 U.S.C. § 794;

(3) Defendants, acting in their official capacity, have discriminated against plaintiffs by refusing to provide them with half-time readers or their mechanical equivalent;

(4) Plaintiffs are barred from recovering damages by the Eleventh Amendment.

An appropriate order follows.[29]

---

[29]Thomas Mobley intervened as a plaintiff purporting to represent a class of similarly situated blind IMWs. The motion for class certification was opposed by defendants, and disposition of the motion was deferred pending this opinion. In the accompanying order, I will direct defendants either to stipulate to the applicability of this opinion to the class or to show cause why class certification should not issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN NELSON, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
RICHARD THORNBURGH, et al.	:	NO. 81-5115
	:	

O R D E R

For the reasons recited in the accompanying Opinion, it is hereby ORDERED that:

(1) Judgment is entered for the plaintiffs and against the defendants;

(2) The parties, within thirty (30) days of the date of this Order, shall submit a form of order outlining a remedy not inconsistent with this opinion;

(3) Defendants, within ten (10) days of the date of his Order, shall declare whether they continue to oppose class certification, and, if so, submit

a memorandum explaining why class certification should not be ordered. A responsive memorandum, if necessary, shall be filed within ten (10) days thereafter, and argument, if necessary, shall follow promptly.

JULY 12, 1983 (s) Louis H. Pollak
POLLAK, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN NELSON, et al.,	:	CIVIL ACTION
Plaintiffs	:	
v.	:	
RICHARD THORNBURGH, et al.,	:	
Defendants	:	NO. 81-5115

ORDER

AND NOW, January 18, 1984, the parties' attached Stipulation Regarding Class Certification is hereby APPROVED.

(s) Louis H. Pollak

POLLAK, J

ENTERED: 1-20-84

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

MARTIN NELSON, et al.	:	CIVIL ACTION
Plaintiffs	:	
v.	:	
RICHARD THORNBURGH, et al.	:	
Defendants	:	NO. 81-5115

STIPULATION REGARDING CLASS CERTIFICATION

1. Plaintiffs propose certification of a class consisting of:

> Employees of the Pennsylvania Department of Public Welfare who will be denied or who were denied since June 3, 1977 a reader and who are either blind or visually impaired to such a degree as to constitute a handicap requiring a reader in order to perform the essential functions of their jobs on an equal basis with employees who do not require a reader because they are neither blind nor visually impaired.

2. Defendants have opposed certification of this class.

3. In lieu of court resolution of the class issue, the parties have agreed as follows:

4. Plaintiffs agree to defer requesting certification of the proposed class pending resolution of defendants' appeal of this matter.

5. Should the District Court's decision be affirmed on principles broadly applicable to the proposed class, defendants will, subject to the limitations in ¶¶6 and 8 below, provide reading assistance for members of the following sub-classes:

(a) Employees of DPW classified as Income Maintenance Workers, Social Workers, Casework Supervisors, Caseworkers, and Public Welfare Administrators;

(b) Employees of DPW classified as Rehabilitation Specialists, Rehabilitation Counselors, Rehabilitation Supervisors and Rehabilitation Teachers;

(c) Employees of DPW classified as Clerk-Typists I and II and Clerical Supervisors.

6. In the event that ¶5, supra, is to be implemented, counsel for plaintiffs and defendants will seek to determine whether each sub-class member requires a reader, and, if so, how many hours of reading assistance the member requires per week. Should counsel disagree as to whether any individual requires a reader, the number of hours

of reading assistance needed, or any other relevant matter which may arise, they may bring this disagreement before the Court by appropriate motion.

7. Should the District Court's decision be affirmed, but not on principles broadly applicable to the proposed class, counsel will seek to determine to what extent ¶5 must be implemented. Defendants will proceed as per ¶¶ 5 and 6 to areas of agreement. The parties may seek court resolution as to areas of disagreement.

8. Both parties maintain such rights as they may have under Rule 60(b), Fed. R. Civ. P., to move for modification of this order and other orders in this case.

9. The parties agree that this stipulation does not constitute a con-

sent decree for purposes of Federal Rule of Civil Procedure 60(b).

ANDREW F. ERBA, Esq.
Counsel for Plaintiffs
Nelson and Buntele

MAURA A. JOHNSTON, Esq.
Deputy Attorney General
Counsel for Defendants

STEPHEN F. GOLD, Esq.
Counsel for Intervenor
Mobley

MR. ERBA: That's right, your Honor, especially for plaintiffs, our feeling all along has been accommodation standards depending on the individual, has to be determined on that individual's needs in some way so we would enjoy the opportunity to sit down and have some input with respect to each of the plaintiffs, and I think that there's, as I say, a range of accommodations which is possible to pick the appropriate one for my clients, at least.

THE COURT: Does this intersect at all with the class action, this problem? Do you want me to wait and do nothing about that at this stage?

MR. GOLD: I would prefer obviously to get it over with. I mean the reason, if your were were [sic] to find liability, there are 78 or

thereabouts members of the class.

THE COURT: Throughout the Commonwealth?

MR. GOLD: Throughout the Commonwealth. Their needs vary. The defendants have produced two-foot-thick worth of responses for the other 78, describing their jobs, describing the amount of time they need readers, some of them don't need a reader or any assistants or any accommodation whatsoever, given the nature of their job.

. . .

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN NELSON, and PAULA BUNTELE	:	CIVIL ACTION
Plaintiffs	:	No. 81-5115
v.	:	
RICHARD THORNBURGH, et al.	:	
Defendants	:	

DEFENDANTS' RESPONSE TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Defendants, by their attorney, file the following responses to Plaintiffs' First Set of Interrogatories.

INTERROGATORY 1: State each and every way in which you are accommodating plaintiffs' disabilities as alleged in Paragraphs 36 and 37 of your answer.

ANSWER:

Plaintiffs' disabilities are being accommodated as follows:

(a) As to both Mr. Nelson, who is employed in the Center District Office of the Philadelphia County Board of Assistance (PCBA), and Ms. Buntele, who is employed in the Snyder District Office of PCBA:

(i) Readers working in conjunction with Mr. Nelson and Ms. Buntele are permitted to work on the premises of the PCBA District Offices in which Plaintiffs are employed.

(ii) Readers working in conjunction with Mr. Nelson and Ms. Buntele are permitted by the PCBA District Offices in which plaintiffs are employed to use all office equipment and office supplies available to caseworkers.

(iii) Braille paper is supplied to Mr. Nelson and Ms. Buntele by their respective District Offices.

(iv) On November 6, 1981, a meeting was held by PCBA to provide plaintiffs an opportunity to present suggestions with regard to appropriate PCBA accommodations of their visual handicap. Mr. Nelson and Ms. Buntele attended that meeting and made suggestions which are now being reviewed by PCBA.

(v) By letter dated January 28, 1982, plaintiffs were informed that the Nevil Institute of Philadelphia provides free reader services. It was suggested that plaintiffs contact the Nevil Institute with regard to free reader services, and that plaintiffs then contact PCBA regarding readers if the Nevil Institute was of no assistance in that matter.

(b) As to Ms. Buntele only:

(i) Persons employed in the

Snyder District Office regularly assist Ms. Buntele in locating records, processing forms, and performing other tasks, and provide her with guidance in walking.

(ii) Supervisors employed in the Snyder District Office review more of Ms. Buntele's work than that of other caseworkers for completeness and accuracy.

(iii) In November of 1979, Edna Fred, District Administrator, assigned Ms. Buntele to a sighted supervisor. Ms. Buntele's previous supervisor had been visually handicapped.

(iv) Ms. Buntele has been provided with a dictaphone by the Snyder District Office. Dictaphones are not ordinarily provided to caseworkers.

(v) Ms. Buntele has been assigned a worker to assist her in case of fire drills in the Snyder District Office.

(vi) Ms. Buntele's reader is provided a separate desk in the Snyder District Office.

(vii) Ms. Buntele's current supervisor, Mr. Cupit, held a meeting in January or February, 1982, with a new reader working with Ms. Buntele to familiarize that reader with the Snyder District Office and with PCBA eligibility determination documents.

(viii) Ms. Buntele's request that she be allowed to redetermine eligibility of assistance recipients two days per week in the District Office, rather than in the field, was granted by Edna Fred, District Administrator. Ordinarily caseworkers

redetermine eligibility one day per week from the District Office.

(c) As to Mr. Nelson only:

(i) In October, 1980 and December, 1980, Mr. Nelson was without a reader. Persons employed in the Center District Office, including Mr. Nelson's supervisor, Barbara Haskins, provided reading assistance to Mr. Nelson at those times.

(ii) From December, 1980, to December, 1981, Mr. Nelson had a part-time reader. During that time, persons working in the Center District Office assisted Mr. Nelson with various duties.

(iii) Mr. Nelson has been provided with a typewriter by the Center District Office. Caseworkers are not ordinarily provided with typewriters.

(iv) Mr. Nelson's supervisor, Barbara Haskins, provides reading assistance with regard to the PCBA Manual if no reader is available to Mr. Nelson.

(v) Supervisor Haskins has assisted Mr. Nelson in completing work in time to meet deadlines.

(vi) Supervisor Haskins allowed Mr. Nelson to chose [sic] a convenient desk location when work locations were changed in the Center District Office in approximately June of 1980.

(vii) Supervisor Haskins permitted Mr. Nelson to keep his existing caseload when caseloads in the Center District Office were redistributed in June, 1980. Mr. Nelson's existing files had already been brailled.

(viii) Mr. Nelson's current supervisor checks more of his work, and

does so in more detail, than is done with respect to the work of other caseworkers. This is the case because of Mr. Nelson's use of readers. Mr. Nelson's prior supervisor, Joyce English, also checked his work more carefully than that of other caseworkers.

. . .

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN NELSON, et al.	:	CIVIL ACTION
	:	
Plaintiffs	:	NO. 81-5115
	:	
v.	:	
	:	
RICHARD THORNBURGH, et al.	:	
	:	
Defendants	:	

DEFENDANTS' RESPONSE TO PLAINTIFF-INTERVENOR MOBLEY'S SECOND INTERROGATORIES AND REQUEST FOR INSPECTION OF DOCUMENTS

Defendants, by their attorney, file the following responses to Plaintiff-Intervenor Mobley's Second Set of Interrogatories.

. . .

INTERROGATORY NO. 2: State how the defendants accommodated intervenor Mobley's disability.

a. State the date each accommodation began.

b. State the date each accommodation terminated.

ANSWER:

Mr. Mobley's disability is being accommodated as follows:

(i) Readers working in conjunction with Mr. Mobley have been, and are, permitted to work on the premises of the Philadelphia County Board of Assistance (PCBA) District Offices in which Mr. Mobley has been, and is now, employed.

This accommodation has been in effect since Mr. Mobley was hired by PCBA, in 1975, and continues in effect at present.

(ii) Readers working in conjunction with Mr. Mobley are permitted by PCBA to use all office equipment and office supplies available to caseworkers.

This accommodation has been in effect since Mr. Mobley was hired by PCBA, in 1975, and continues in effect at present.

(iii) On November 6, 1981, a meeting was held by PCBA to provide Mr. Mobley and other employees the opportunity to present suggestions with regard to appropriate PCBA accommodation of their visual handicaps. The suggestions made at that meeting are being reviewed by PCBA.

(iv) Persons employed by PCBA in the District Offices where Mr. Mobley has worked, and now works, have regularly assisted Mr. Mobley in locating records, processing forms, and performing other tasks, and provide him with guidance in walking.

This accommodation has been in effect since Mr. Mobley was hired by

PCBA, in 1975, and continues in effect at present.

(v) Supervisors employed by PCBA in the District Offices where Mr. Mobley has worked have regularly checked more of his work, and have done so in more detail, than is done with respect to the work of other caseworkers. This is the case because of Mr. Mobley's use of readers.

This accommodation has been in effect since at least January 1, 1979. It continues in effect at present.

(vi) Mr. Mobley's supervisors have held meetings with Mr. Mobley's readers to familiarize them with PCBA, the District Offices in which Mr. Mobley has worked, and the various forms processed by caseworkers.

This accommodation has been in effect since Mr. Mobley was hired by

PCBA, in 1975, and continues in effect at present.

(vii) Mr. Mobley has been permitted to redetermine eligibility of assistance recipients in the District Office, rather than in the field, more frequently than have other caseworkers.

This accommodation has been in effect since approximately June 1, 1982, and continues in effect at present.

(viii) Persons employed by PCBA have at various times provided reading assistance to Mr. Mobley when his reading assistants were not available to him.

This accommodation has been in effect since at least January 1, 1979, and continues in effect at present.

(ix) Supervisors employed by PCBA have assisted Mr. Mobley in completing work in time to meet deadlines.

This accommodation has been in effect since at least January 1, 1979, and continues in effect at present.

(x) Mr. Mobley was permitted to keep his existing caseload when caseloads were redistributed in the Elmwood District Office. Mr. Mobley's existing files had already been brailled.

This accommodation was in effect from January 1, 1979 through August 20, 1981, when Mr. Mobley left the Elmwood District Office on a medical leave of absence.

(xi) On September 28, 1981, Mr. Mobley requested reassignment to a District Office nearer to his home, due to transportation difficulties arising from his visual handicap. This request was granted by PCBA to accommodate Mr. Mobley, who was not eligible for reassignment under existing PCBA practice and policy.

. . .

DEFENDANTS' EXHIBIT 5

COMPARATIVE SALARIES AND BENEFITS:

INCOME MAINTENANCE WORKER II AND

READER/CLERK TYPIST I

	Income Maintenance Worker II	Reader/Clerk Typist I
Hourly wage:	$ 10.93	$ 5.26
Yearly gross:	21,379.08	10,288.56
Yearly Commonwealth Social Security Contribution	1,432.31	689.29
Yearly Commonwealth Health and Welfare and Retirement Contribution	430.32	430.32
Yearly Commonwealth Medical and Group Life Insurance Con-Contribution	1,867.85	1,867.85
Total Yearly Salary and Contributions	$25,109.56	$13,276.02

Source: DPW Personnel Manual

Office - Supreme Court, U.S.
FILED
JUN 9 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1864

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD THORNBURGH, et al.,
Petitioners

v.

MARTIN NELSON, PAULA BUNTELE, and THOMAS MOBLEY,
Respondents

BRIEF IN OPPOSITION OF NELSON, et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

*Stephen F. Gold
1315 Walnut Street, Suite 1632
Philadelphia, PA 19107
(215) 735-7200

*Andrew Erba
COMMUNITY LEGAL SERVICES, INC.
Juniper and Locust Streets
Philadelphia, PA 19107
(215) 893-5300
Attorneys for Respondents

*Counsel of record.

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court made a correct factual determination when it held that providing respondents with reasonable accommodation would not be an "undue burden" on petitioners as that term is defined in the federal regulations which implement the Rehabilitation Act of 1973, 29 U.S.C. §794; 45 C.F.R. §84.12(c) (1983).

TABLE OF CONTENTS

TABLE OF CITATIONS

No. 83-1864

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD THORNBURGH, et al.,

Petitioners

v.

MARTIN NELSON, PAULA BUNTELE, and THOMAS MOBLEY,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF NELSON, et al., IN OPPOSITION TO THE PETITION

Respondents Martin Nelson, Paula Buntele and Thomas Mobley respectfully request that the Court deny the petition for writ of certiorari seeking review of the Judgment Order of the United States Court of Appeals for the Third Circuit in this case.

Pursuant to the Honorable Ruggero J. Aldisert, the Court of Appeals issued its Judgment Order on March 6, 1984; the Order is not yet reported. The opinion of the district court is reported at 567 F.Supp. 369 (E.D. Pa. 1983).

STATEMENT OF THE FACTS

Respondents Nelson, Buntele and Mobley are blind. They are employed by respondents, the Pennsylvania Department of Public Welfare (DPW), and have been since the early 1970s. They have always received periodic, excellent evaluations. From the mid-1970s to the present, respondents have on their own employed part-time readers, and there is no dispute that with this assistance they have been "otherwise qualified" handicapped persons. Respondents pay approximately $2,400.00 yearly for readers from their net salaries of $21,000.00 per year. The remainder of their reader costs are paid by a Supplemental Security Income grant that is available to the blind.

DPW administers various federal programs. The district court found that petitioners dispense $4,310,000,000 to clients in those federal programs, most of which is from the federal government (Pet. App. 9a). In addition, DPW's budget includes $300,000,000 to administer these federal programs, of which $141,000,000 is from the federal government. (Pet. App. 9a). Approximately eighty percent (80%) of the administrative budget pays the salary and fringe benefits for DPW's 38,000 employees. (Pet. App. 9a). In addition to salaries, other administrative costs include $600,000 for travel reimbursements for county employees (Pet. App. 53a, n.20) and $15,318,000 for computer operations.

The district court found that the caseworkers' "central function . . . is the determination of the client's initial and continued eligibility for federal and state benefits." (Pet. App. 11a). This task involves interviewing clients; recording the results of the interviews on standardized forms; determining eligibility for benefits; and processing the claim for benefits through appropriate channels. (Pet. App. 11a-15a).

The skills which are essential to these activities are, *inter alia*, the ability to handle distraught clients and to assess accurately their needs; dedication and judgment; the ability to apply the facts of the client's situation to the general rules contained in the Manual; and the ability to work under pressure. (Pet. App. 17a). Helpful, but not essential, is the ability to read without assistance. (Pet. App. 17a).

The Court also found that DPW's previous efforts at accommodation were inadequate, but that with reasonable accommodation, respondents could perform their jobs as well as their sighted colleagues.[1] Based on the respondents' and petitioners' expert evidence proferred at trial, the district court found there were at least four available reasonable accommodations which could be used, either alone or in combination:

> 1. Adjusting DPW procedures, including brailling DPW forms, and requiring welfare clients to return the day after their interview to sign intake sheets (Pet. App. 26a);
>
> 2. Printing the DPW Manual in braille (Pet. App. 27a);
>
> 3. Purchasing technology, including the Versabraille (which petitioners' expert contended was the most effective and efficient machinery for the caseworker job) (Pet. App. 27a); and/or,

---

1. In early 1980, respondent Nelson and Buntele filed administrative complaints with the Office of Civil Rights (OCR). In 1982, OCR determined that the petitioners' refusal to accommodate respondents violated Section 504 of the Rehabilitation Act of 1973.

4. Providing a reader. (Pet. App. 31a).[2]

After outlining this range of accommodations, the district court explicitly stated that "it will be up to the defendants to determine whether readers alone would be utilized or whether use would also be made of one or more of the other types of accommodations." (Pet. App. 34a and Order 74a).

The district court did not order any specific accommodation. Rather, the court outlined several accommodations which would have little long-range cost. For example, the court found that petitioners could restructure a respondent's job ("a blind IMW could gather client information one day and, on the following day, use the reader to prepare the form, with client verification on that day or soon thereafter"). (Pet. App. 31a-32a). Alternatively, petitioners could use existing clerical staff to "double as a reader" — "the most sensible method of accommodation." (Pet. App. 32a).

Notwithstanding these alternatives, petitioners decided on their own — not because the court had so ordered — to pay for readers. Petitioners chose the most expensive accommodation and did not attempt any other method to reduce the need for a reader.[3] Yet petitioners pivot their criticism of the district court's decision on these costs.

The district court balanced the cost of accommodations against "DPW's $300,000,000 administrative bud-

---

2. The lower court found that any combination of the first three accommodations reduces substantially the amount of time a reader is necessary.

3. Petitioners are absolutely incorrect in arguing that the court imposed upon them the cost of readers; petitioners can choose what reasonable accommodations can effectively meet respondents' needs and can reduce expenditures for readers to nearly zero. The costs of readers, as the district court found, would be lowered if the petitioners modified their procedures even slightly. (Pet. App. 33a). Similarly, if the petitioners invested on a one-time basis in new technology, the need for readers will be reduced significantly. (Pet. App. 30a). Petitioners have not attempted any alternate accommodation to reduce the need for readers.

get [, its 38,000 employees,] . . . and the ease of adopting [the accommodations] without any disruption of DPW's services. . . . ," (Pet. App. 52a-53a). The court also recognized that the cost of a combination of alternate accommodations could be *de minimus*. Based on these factors, the court concluded that the accommodations did not impose any undue fiscal or administrative burden on petitioners, and thus, such accommodations were mandated by the federal regulations implementing §504. See *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979) (recognizing accommodations may be required if they do not impose "undue financial and administrative burden on a State.").

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS CONSISTENT WITH *DAVIS* AND *DARRONE* AND IS A UNIQUE, FACTUALLY-DEPENDENT CASE THAT DOES NOT RAISE ANY IMPORTANT QUESTION WHICH WOULD JUSTIFY REVIEW BY THIS COURT

In *Southeastern College v. Davis, supra,* the issue was whether the plaintiff, "a hearing impaired applicant to a professional level nursing program was an 'otherwise qualified handicapped individual' with respect to that program." Because of the limitations imposed by her hearing impairment, Mrs. Davis could not perform all of the essential functions of a student in the College's nursing program. As the district court pointed out in its careful analysis,

> *Davis* presents an example of an insurmountable employment barrier, because the ability to hear is an essential requirement for a nurse. . . . (Pet. App. 45a),

and Mrs. Davis could not, even with accommodation, hear.

The court went on to distinguish the instant case from *Davis*. Here, the Court held, with inexpensive, in-

substantial accommodations, respondents cannot only perform all essential job functions, but they can do so as well as their non-handicapped colleagues — a fact not disputed by petitioners.

The district court merely applied the "undue burden" standard as it is defined in the federal regulations, 45 C.F.R. §84.12(c).[4] These regulations are the result of an extended rule-making process in which more than 300 written comments were reviewed and numerous meetings through the country were held. *See* 42 Fed. Reg. 22,676 (1977). In *Consolidated Rail Corporation v. Darrone*, ____U.S. ____, 104 S.Ct. 1248 (1948), this Court recently reviewed the federal regulations in the present case and unanimously ruled that they were consistent with Congress' intention that the Rehabilitation Act *expand* and *promote* the employment of the handicapped.[5] The lower court did no more than apply these federal regulations to the facts of the instant case.

The district court merely analyzed the size of petitioners' program (with respect to its budget and number of employees), the composition of petitioners' workforce, and the cost of accommodation. Balancing these factors, the lower court concluded that accommodations (whether readers, technology, job restructuring, or any combination of these or other modifications) did not amount to an undue burden on petitioners.[6]

---

4. The Department of Justice filed an amici brief in both the district and circuit courts. In the district court, the government supported respondents and advised the court that the Department of Health and Human Services' regulations required petitioners to provide accommodations including reader services. In the circuit court, the government argued that the district court correctly interpreted the HHS regulations.

5. Petitioners failed to mention to this Court that the Honorable Ruggero Aldisert relied on *Darrone* in the Circuit's Judgment Order. (Pet. App. 3a).

6. Although there is a class of persons similarly situated to the respondents, to this date, none of these persons have requested *any* accommodation from petitioners. In fact, since Ms. Buntele is no longer working for DPW, the members of the class receiving accommodation are only Messrs. Mobley and Nelson.

Petitioners challenge the lower court's findings that the accommodations impose an undue financial or administrative burden on them. The writ of certiorari, in essence, questions the district court's factual findings with respect to these issues. The correctness of these factual findings are not important questions worthy of this Court's attention.

II. THE DISTRICT COURT'S DECISION DOES NOT CONFLICT WITH ANY OTHER COURT OF APPEALS

Petitioners cite three cases for the proposition that the district court's opinion conflicts with other circuits: *American Public Transit Association v. Lewis*, 665 F.2d 1272 (D.C. Cir. 1981); *Dopico v. Goldschmidt*, 687 F.2d 644 (2nd Cir. 1982); *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983). These decisions do not conflict with the present case. Rather, they construe the mass transit accommodation, whereas the present regulations construe the HHS regulations. Therefore, the petitioners' circuit decisions deal with different administrative regulation, promulgated for a different factual situation than the regulations before this Court.

Moreover, these circuit decisions are consistent with this case. They held the use of designated percentage of expenditures for the handicapped was reasonable. The percentage of expenditures ordered by the courts in those cases is far in excess of what petitioners in the present case have been requested to expend on respondents.

III. THE ISSUE THAT A FEDERAL COURT MAY NOT ENJOIN STATES ON THE BASIS OF FEDERAL LAW WAS NOT RAISED OR BRIEFED IN THE LOWER COURTS AND PETITIONERS ARE INCORRECT THAT THE LOWER COURTS' ACTIONS WERE CONTRARY TO THE ELEVENTH AMENDMENT

In the district court, petitioners never raised the issue of whether a federal court may order prospective injunctive relief against the Department of Public Welfare for violation of the Rehabilitation Act.[7] Three days before the oral argument in the circuit, petitioners asked the circuit to reverse on this issue. The Honorable Ruggero Aldisert, in the circuit's Judgment Order, affirmed the district court and in a footnote wrote that "*Pennhurst State School and Hospital v. Halderman*, ____ U.S. ____ (52 USLW 4155, January 23, 1984), does not compel a contrary result. Here a federal statute is being construed; in *Pennhurst*, the Court was construing a state statute." (Pet. App. 3a).

There can be no doubt that federal courts have federal jurisdiction to enforce prospectively a federal statute. Petitioners' argument would deny a federal forum for aggrieved plaintiffs for the prospective enforcement of basic civil rights violations. No cases suggest petitioners' argument has any merit whatsoever.

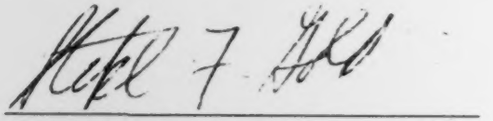
Moreover, the instant case is an inappropriate case to decide the issue. First, whether the Rehabilitation Act was passed under Section 5 of the Fourteenth Amendment or the spending power is very unclear. (Pet. App. 70a-71a). Second, petitioners are blatantly wrong when they state that the Rehabilitation Act only "induce[d] conduct" but did "not prohibit conduct; rather, [it] encourage[s] desired conduct. . . ." (Pet. App. 20-21). To the contrary, the Rehabilitation Act expressly prohibits conduct, to wit, discriminating against handicapped persons. Third, petitioners do not have "discretion" under the Rehabilitation Act to discriminate. Rather, under the supremacy clause, petitioners must comply with this mandatory law.

7. The district court did rule that the Eleventh Amendment barred plaintiffs' claim for damages. (Pet. App. 69a-71a).

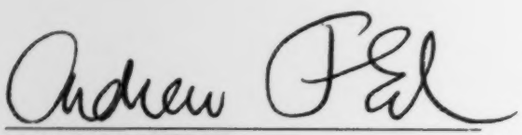
CONCLUSION

For the above-stated reasons, respondents Nelson, Buntele and Mobley submit that the petition for writ of certiorari should be denied.

Respectfully submitted,



STEPHEN F. GOLD
1315 Walnut Street, Suite 1632
Philadelphia, PA 19107
(215) 735-7200



ANDREW ERBA
Community Legal Services, Inc.
Juniper and Locust Streets
Philadelphia, PA 19107
(215) 893-5300
Attorneys for Respondents

Office-Supreme Court, U.S.
FILED
JUN 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1864

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

RICHARD THORNBURGH, Governor,
HELEN O'BANNON, Secretary of
the Department of Public Welfare,
and DON JOSE STOVALL, Executive
Director, Philadelphia County
Board of Assistance

Petitioners

v.

MARTIN NELSON, PAULA BUNTELE,
and THOMAS MOBLEY

Respondents

AMICI CURIAE BRIEF In Support Of The Grant Of A Writ Of Certiorari On Behalf Of Arizona, Delaware, Georgia, Hawaii, Illnois, Louisiana, Mississippi, New Hampshire, North Dakota, South Dakota, the Virgin Islands, and Wyoming

ROBERT K. CORBIN
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007
602-255-4266
(Listing Of Counsel Continued Inside)

BEST AVAILABLE COPY

CHARLES M. OBERLY, III
Attorney General of Delaware
820 North French Street, 8th Floor
Wilmington, Delaware 19801
302-571-2500

MICHAEL J. BOWERS
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334
404-656-4586

TANY S. HON
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96873
808-584-4740

NEIL HARTIGAN
Attorney General of Illinois
500 South Second
Springfield, Illinois 62703
312-793-3698

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
2-3-4 Loyola Building
New Orleans, Louisiana 70112
504-568-5575

WILLIAM A. ALLAIN
Attorney General of Mississippi
Carroll Gartin Justice Building
P.O. Box 220
Jackson, Mississippi 39205
601-354-7130

GREGORY H. SMITH
Attorney General of New Hampshire
208 State House Anne
Concord, New Hampshire 03301
603-271-3655

ROBERT WEFALD
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505
701-224-2210

MARK V. MEIERHENRY
Attorney General of South Dakota
State Capitol Building
Pierre, South Dakota 57501
605-773-3215

J'ADA M. FINCH-SHEEN
Attorney General of the Virgin Islands
P.O. Box 280
St. Thomas, Virgin Islands 00801
809-774-5666

ARCHIE G. McCLINTOCK
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
307-777-7841

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

United States Constitution

Statute

Rules Of Court

OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit has not yet been reported. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 567 F. Supp. 369 (E.D. Pa. 1983). The judgment order of the Court of Appeals and the opinion of the district court are reproduced in the appendix to the petition for writ of certiorari of Governor Richard Thornburgh, et al.

CONSENT OF THE PARTIES

Consent of the parties is not required since this brief is presented on behalf of the States, Commonwealths or Territories of Arizona, Delaware, Georgia, Hawaii, Illinois, Louisiana, Mississippi, New Hampshire, North Dakota, South Dakota, the Virgin Islands, and Wyoming, by their respective Attorneys General (hereinafter Amici). See U.S.S.Ct. Rule 36.4.

INTEREST OF AMICI CURIAE

In Nelson, the Third Circuit pronounced expansive entitlements under Section 504 of the Rehabilitation Act of 1973 for handicapped persons employed by recipients of federal funds. The interest of Amici, all of whom are recipients of federal funds, stems from their role as employers of handicapped persons, and the significant impact of this decision on their responsibilities as employers.

The Court of Appeals held, in affirming the district court by judgment order, that Section 504 requires Pennsylvania's Department of Public Welfare to provide readers for blind employees, at a cost of $6,600 per year for each blind

worker.[1] In more general terms, the Court held that Section 504 requires a recipient of federal funds to expend substantial sums to enable handicapped employees to perform their job duties. If the Third Circuit's decision stands, the states will be uncertain as to the nature and extent of the obligations which they assume under Section 504 when they choose to accept federal funds. The states have a strong interest in obtaining the clearest and earliest possible guidance on the Section 504 issues, in order to plan effectively for

---

[1] Nelson is a class action. Plaintiffs' counsel estimated at trial that the class consists of approximately 78 employees. Pet. App. 82a-83a. Whatever the precise number, and whatever the level of accommodation required for each member, it is clear that Pennsylvania's Department of Public Welfare will have to spend substantial sums each year to accommodate its blind employees.

required accommodations for the handicapped. Indeed, this guidance is needed to enable states to decide whether to accept the federal funds which trigger Section 504 obligations in the first place.

Moreover, should the decision of the Third Circuit stand, additional lawsuits are inevitable. Considering that the states employ thousands of handicapped persons, the potential for future federal court litigation of similar issues is staggering.

Finally, the Court of Appeals decided that the Eleventh Amendment does not bar a federal court from ordering state officials to expend state funds when the basis for the order is a federal statute enacted pursuant to Congress' spending power. This question was left open by this Court in Pennhurst

State School and Hospital v. Halderman, No. 81-2101 (January 23, 1984). States have a substantial interest in obtaining this Court's decision on this question. Amici are entitled to know whether, when they accept federal funds, they are exposed to the risk of having to expend substantial sums to comply with federal court injunctive orders based on spending power statutes.

STATEMENT OF THE CASE

Amici hereby incorporate by reference the Statement of the Case contained in the petition for writ of certiorari of Governor Richard Thornburgh, et al.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Below Raises Significant Questions As To The Scope Of Obligations Placed Upon Recipients Of Federal Funds By Section 504 Of The Rehabilitation Act Of 1973.

In Southeastern Community College v. Davis, 442 U.S. 397 (1979), this Court decided that Section 504 did not require an educational institution to undertake substantial modifications to its program to enable plaintiff Davis, who had a hearing disability, to participate in the program. Here, the Third Circuit, contravening the principles set forth in Davis, has ordered Pennsylvania to take substantial, costly steps to enable blind employees to perform their jobs. The Third Circuit's holding likewise conflicts with decisions of the First, Second, and District of Columbia Circuits. The latter courts have held

that Section 504 does not require entities which receive federal monies to undertake substantial, expensive affirmative steps to accommodate handicapped persons. See Rhode Island Handicapped Action Committee v. Public Transit Authority, 718 F.2d 490 (1st Cir. 1983); Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981) (transportation authorities not required by Section 504 to undertake expensive affirmative action to make public transportation accessible to the handicapped).

Serious questions as to the scope of obligations placed upon recipients of federal funds by Section 504 have thus been raised by the decision in Nelson. Nelson appears to hold that whenever a recipient of federal monies has a "large"

budget -- regardless of the magnitude of the existing obligations which that budget must fund -- Section 504 requires the recipient to spend substantial amounts to enable handicapped persons to overcome their disabilities.

Plainly, the uncertainty created by the Nelson decision causes significant difficulties for all Amici in planning and providing accommodations for the handicapped. At present, states spend substantial amounts on accommodations for the handicapped each year. For state policymakers and administrators to effectively make short and long range plans, it is imperative that they know whether the Section 504 entitlements declared in Nelson are valid and will, therefore, become applicable elsewhere in the country. Absent such guidance, Amici are severely hampered in planning

rational allocations of their limited resources.

Amici are entitled to know the conditions imposed upon them by Congress when they decide to accept federal funds. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). In the context of this case, Amici must know whether they assume the expensive Section 504 obligations delineated by the Third Circuit when they accept federal grants. Without this knowledge, Amici cannot make rational determinations as to whether to accept federal funds in the first place.

II. This Court Should Resolve The Question Whether The Eleventh Amendment Bars A Federal Court From Ordering State Officials To Expend State Monies When The Order Is Based On A Federal Spending Power Statute.

In Pennhurst State School and Hospital v. Halderman, No. 81-2101 (January 23, 1984), this Court specifically declined to decide whether the Eleventh Amendment bars a federal court from ordering state officials to expend state funds when the basis for the order is a federal statute enacted under Congress' spending power. Slip Op. at 13, n.13. This issue is of considerable significance to Amici because of its implications for states' sovereignty, and its potential impact on state budgets.

In general terms, a suit is brought against the state if the relief sought would be paid for from state

funds or interfere with public administration, or if the effect of the judgment would be to restrain or require governmental action. See Pennhurst, supra, slip op. at 10-11, n. 11. An action wherein a plaintiff seeks costly injunctive relief against state officials pursuant to a federal spending power statute is a "suit against the state" by any measure. If a state has not waived its immunity from suit, either generally[2] or by accepting federal funds,[3] and if the state defendants were not acting ultra vires, the Eleventh Amendment bars such suits. Florida Department of State v. Treasure

---

[2]See Pennhurst, supra, slip op. at 12-13, n. 12.

[3]See Edelman v. Jordan, 415 U.S. 651, 673-674 (1974).

Salvors, Inc., 458 U.S. 670 (1983); Ex Parte Young, 209 U.S. 123 (1908).

Assuming the absence of any waiver of immunity, then,[4] the sole Eleventh Amendment inquiry becomes whether state defendants have acted ultra vires. This is a two-pronged question: (1) Were the state defendants acting within the authority apparently delegated to them by the state? (2) If they were, did federal law strip them of that authority? Pennhurst, supra, slip op. at 9-12. Amici believe, in agreement with the position taken by the Commonwealth of Pennsylvania, that where state officials act within the

---

[4]Pennsylvania did not in any way waive its immunity from suit in this case. See Petition for Writ of Certiorari of Governor Richard Thornburgh, et al., at 18-19.

authority apparently delegated to them by the state, federal spending power statutes cannot operate to strip them of that authority. Spending power statutes, rather than prohibiting or requiring conduct by state officials, merely induce conduct. They reward conduct meeting their conditions by providing states with federal funds, and sanction undesired conduct by withholding funds. Spending power statutes in no way implicate the fiction of Ex Parte Young, supra. Accordingly, federal court actions against state officials based upon federal spending power statutes are actions against the state in every respect, and are barred by the Eleventh Amendment.

As noted above, states, when they accept federal funds, are entitled to know the conditions imposed upon them

via federal spending power statutes. At present, Amici do not know whether their acceptance of federal grants exposes them to the risk that a federal court, acting pursuant to a federal spending power statute, may grant injunctive relief requiring them to expend substantial sums from the state treasury. As long as this is the case, Amici cannot make rational choices as to whether or not to accept federal funds. In some instances, the risk of significant depletion of the state treasury to pay for injunctive relief may outweigh the benefits of federal funding.

Amici are entitled, then, to know whether they are in fact incurring substantial risks of this sort by accepting federal grants. All states would directly benefit by a definitive

statement from this Court as to whether the Eleventh Amendment bars federal courts from ordering costly injunctive relief, based on federal spending power statutes, which will be paid for out of limited state funds.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007
602-255-4266

CHARLES M. OBERLY, III
Attorney General of Delaware
820 North French Street,
8th Floor
Wilmington, Delaware 19801
302-571-2500

MICHAEL J. BOWERS
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334
404-656-4586

TANY S. HON
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96873
808-584-4740

NEIL HARTIGAN
Attorney General of Illinois
500 South Second
Springfield, Illinois 62703
312-793-3698

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
2-3-4 Loyola Building
New Orleans, Louisiana 70112
504-568-5575

WILLIAM A. ALLAIN
Attorney General of Mississippi
Carroll Gartin Justice Building
P.O. Box 220
Jackson, Mississippi 39205
601-354-7130

GREGORY H. SMITH
Attorney General of New Hampshire
208 State House Anne
Concord, New Hampshire 03301
603-271-3655

ROBERT WEFALD
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505
701-224-2210

MARK V. MEIERHENRY
Attorney General of South Dakota
State Capitol Building
Pierre, South Dakota 57501
605-773-3215

J'ADA M. FINCH-SHEEN
Attorney General of the Virgin Islands
P.O. Box 280
St. Thomas, Virgin Islands 00801
809-774-5666

ARCHIE G. McCLINTOCK
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
307-777-7841

Supreme Court, U.S.
F I L E D
JUL 27 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1864

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD THORNBURGH, et al.,

Petitioners

V.

MARTIN NELSON, et al.,

Respondents

On Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit

PETITIONERS' REPLY BRIEF

LeROY S. ZIMMERMAN
Attorney General

By: ANDREW S. GORDON
Senior Deputy Attorney General

MAURA A. JOHNSTON
Deputy Attorney General

ALLEN C. WARSHAW
Senior Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

TABLE OF CITATIONS

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1864

RICHARD THORNBURGH, et al.,

Petitioners

V.

MARTIN NELSON, et al.,

Respondents

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

---

PETITIONERS' REPLY BRIEF

1. Respondents attempt to characterize the district court's order requiring petitioners to provide respondents (and the class they represent) with personal readers as a wholly factual determination

not deserving of the Court's review. (Br. in Opp., 5-7). But respondents' own submission belies their portrayal of the issue before the Court.

Respondents argue (Br. in Opp., 6) that the district court merely applied the "undue burden" standard prescribed by federal regulations, 45 C.F.R. §84.12(c)(1983), but they totally ignore petitioners' primary contention (Pet. 8-11) that the regulations impose obligations on recipients of federal funds far beyond the requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Respondents' contention (Br. in Opp., 6) that the Court reviewed and approved the regulations in Consolidated Rail Corp. v. Darrone, No. 82-862 (February 28, 1984), is nothing short of ludicrous. Darrone addressed no question regarding the validity of administrative

regulations; the Court merely referred to contemporaneous agency regulations - together with the language of Section 504, the legislative history, and the purpose of the statute - to support its conclusion that Section 504 applied to all federally-funded programs, not merely those designed to promote employment. Slip op. at 9-10.

Rather than raising factual questions, which petitioners agree rarely merit this Court's attention, this case raises serious and far-reaching legal questions regarding application of Section 504. This Court recently reiterated "that §504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons." Smith v. Robinson, No. 82-2120 (July 5, 1984), slip op. at 24. Because, as a matter of law, the

district court's judgment, and the regulations upon which the court relied, go beyond the requirements of Section 504, this Court should grant the writ of certiorari and, upon review, reverse the decision below.

2. Respondents argue (Br. in Opp., 8) that "[t]here can be no doubt that federal courts have jurisdiction to enforce prospectively a federal statute [against the States]." Despite their confidence, respondents offer no support for their "black letter" statement. More importantly, they ignore entirely this Court's specific reservation of the question in Pennhurst State School and Hospital v. Halderman, No. 81-2101 (January 23, 1984), slip op. at 13, n.25. Clearly, the question is one deserving of this Court's attention.

Finally, respondents contend (Br. in Opp., 8) that this case is an

inappropriate one for resolving the Eleventh Amendment question because it is, in their view, unclear whether Section 504 is a spending power statute or one passed to enforce the Fourteenth Amendment. This argument proves too much. If that question is, indeed, unsettled, it can only further justify this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

By: ANDREW S. GORDON
Senior Deputy Attorney General

MAURA A. JOHNSTON
Deputy Attorney General

ALLEN C. WARSHAW
Senior Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471